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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)

Implementation of Section)
309(j) of the Communications Act)

PP Docket No. 93-253

TO: The Commission

PETITION FOR SPECIAL AND EXTRAORDINARY RELIEF

MKS Interactive, Inc. ("MKS"), by its attorney and pursuant to Section 1.2104(i) of the Commission's Rules, requests special and extraordinary relief in connection with the recent Interactive Video Data Service ("IVDS") auction, held July 28-29, 1994. Due to acts perpetrated by certain defaulting bidders (the "Defaulters") on the auction floor, MKS and many other bidders that legitimately participated in the auction, have been damaged¹ and irreparably harmed and will continue to suffer irreparable harm unless the Commission acts affirmatively, fairly and equitably to grant the relief prayed for herein. The Petitioner is without an adequate remedy at law.

¹ There is no doubt that MKS has standing to file this petition as it can demonstrate injury from the Defaulters activity and that the injury is within the zone of interests to be protected. FCC v. Sanders Bros., 309 U.S. 470 (1940).

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I. NATURE OF CLAIM

MKS is a legitimate bidder which has complied with all FCC regulations, has paid all sums required in a timely manner, and has filed the required Forms 574 in a timely manner in connection with the IVDS markets for which it was a high bidder at the IVDS auction. MKS files this petition for one reason: It has been damaged and irreparably harmed by the suspicious and perhaps financially unsupported bidding activity on the part of one or more bidders at the July IVDS auction. Specifically, MKS was prevented from effectively bidding by the Defaulters in the markets it had targeted as first choices. As a result, MKS bid on and won second and third choice markets, believing the prices paid by winning bidders on MKS's first choice markets were legitimate and bona fide representations of their fair market value, while not knowing that the spirited bidding was being fueled by persons who were unprepared and without firmly committed funds to pay the sums bid. As a direct and proximate result of the reckless activities of the Defaulters, MKS will be effectively denied the opportunity to bid on the markets primarily targeted when the commission re-auctions the defaulted markets. All of MKS's IVDS auction capital has been committed to the secondary markets purchased at the auction after it was either outbid or prevented from effectively bidding on its primary choices. Unless the Commission grants relief, MKS, and many other legitimate auction winners who are similarly affected, will forever suffer irreparable harm in never being able to participate in a fair auction of the original markets sought. This

is far from a private claim. The public interest in the conduct of fair and equitable auctions is at stake. Future participants in FCC auctions need to know the Commission's processes cannot be manipulated so that they are deprived of the opportunity to bid on markets in which they have a genuine interest.

II. BACKGROUND

A. MKS Application

1. MKS is a small Ohio Corporation, made up of women shareholders and officers, and is a "Designated Entity". MKS entered the Commission's auction in good faith with the intention of availing itself of the benefits being afforded women and minority owned businesses and bringing IVDS to the public at the earliest possible date. MKS was the high bidder in three markets: Market 47-Greensboro, N.C.; Market 45 - Toledo, OH; Market 90 - Charleston, N.C. MKS did not receive any bidding credits for Market 47 - Greensboro, or Market 45 - Toledo, but did receive bidding credits for Market 90 - Charleston. On August 5, MKS made the required down payments and on August 15 it submitted the appropriate applications for these markets, which were accepted for filing.

B. Events at the Auction

2. At the auction, several bidders dominated the bidding in the larger MSA's and outbid MKS and others, thus repeatedly driving the bidding above MKS's capital limit thereby preventing it from effectively bidding. For example, Commercial Realty St. Pete, Inc. ("CRSP") won twenty (20) markets and Interactive America, Inc.

("IAI") won fifteen (15) markets. These two entities, as well as other Defaulters, were consistently outbidding even the most aggressive competitors. In fact, the most aggressive bidders turned out to be the Defaulters themselves, but apparently one Defaulter did not know it was bidding against another, thus bidding the price up when no legitimate bidder was willing to bid any further. In essence, what occurred was an auction with no legitimate cap on the amount that could be bid for licenses. This fact is clearly represented in several markets in which MKS and other legitimate bidders were either outbid or side-lined by persons who won and subsequently defaulted on both the "A" and "B" licenses in the same market. These double default markets are: Lakeland, Tampa, San Diego, Pittsburgh and Las Vegas. Clearly, legitimate bidders never had a chance.

3. The amounts bid by the Defaulters drove the market price up for the top MSAs and created a higher value perception in the minds of legitimate bidders than would have otherwise occurred. Sincere bidders received a deceptive signal as to the value of these markets. As the auctioneer moved down the list, bid prices declined from the highs set by the Defaulters, but did so at levels well above true market value. Bidders such as MKS were unwittingly forced to compete against multiple Defaulters. Tragically, the signals received by legitimate bidders as to market value came from those Defaulters who, in all likelihood, did not have sufficient funds on deposit to make the required payments.

C. Events After the Auction

4. Following the auction, MKS learned that at least two (2) of the Defaulters were seeking capital to cover the bids they were not truly financially capable of paying at the time of the auction or at the payment due date. Besides being a probable violation of the FCC Form 175 Certification, this constitutes unconscionable conduct on the part of those Defaulters. The low up-front payments, allowed the Defaulters, some believing they were financially qualified, to bid millions of dollars which, in fact, they were not qualified to bid as evidenced by the vast number of defaults. For example, one of the largest Defaulters bid on five (5) markets (Detroit, St. Louis, Miami, Pittsburgh and Baltimore) for a total price of \$11,150,000, yet only had to "display" \$2,500 to make those bids. If the Commission's up-front payment of \$.02 per megahertz per pop. utilized in PCS had applied here, the Defaulters would have had to firm up their financing before the auction. That would have surely prevented many defaults and unqualified bidding. These facts, among others, contributed to the upwardly spiraling prices bid by Defaulters. At this point, it is not important to examine the reasons for the well intentioned rule requiring only a minimal financial showing. The important thing to do is rectify the unintended harm which has befallen legitimate bidders.

III. The Defaulters' Bidding Activity Has Tainted The Entire Auction Process.

A. Most Bidders Paid Artificially Inflated Prices.

5. The aggressive and price insensitive bidding by the Defaulters against each other and otherwise legitimate bidders set an artificially high market value for properties, forcing most of the bona fide participants to bid more than they otherwise would have. Soaring prices, forced MKS out of the bidding and onto the sidelines for many markets it had hoped to bid on and acquire. MKS and many other bidders have and will continue to suffer irreparable harm due to the artificially inflated prices. Bona fide applicants could not acquire their target properties because they were either outbid or were prevented from effectively bidding by Defaulters. MKS and perhaps others were either outbid or side-lined in its attempt to acquire Pittsburgh, San Diego, Las Vegas, Lakeland and Tampa, to name just a few, had it not been for the activity of the Defaulters. MKS now has all of its auction capital tied up in the three secondary markets it purchased. As a result, MKS has no auction capital left to bid on the markets to be re-auctioned that it originally wanted. In many markets, MKS was prevented from bidding at all because the initial bids were so high that it was apparent from the outset that its auction budget would be exceeded. This identical fact pattern applies to many other legitimate bidders.

6. MKS believes that the prices it and others paid were in excess of what it would have had to pay, but for the influence of

the Defaulters. The monetary difference is unknown, but whatever the actual difference is, those funds are now unavailable for system construction and operating costs which grossly dis-serves the legitimate bidders and the public interest.

B. The Entire IVDS Marketplace is Adversely Affected.

7. It is not only those markets in which the Defaulters participated that suffer harm. The entire IVDS marketplace as a whole is damaged. An examination of the Defaulters bidding patterns reveals that in many instances they bid on the largest market within an ADI ("Area of Dominant Interest"), but did not bid for surrounding markets. As a result, where a default occurred in a large market, winning bidders in small markets within the same ADI will likely be forced, due to the Commission's timetable, to commence service without the benefits of corresponding services being "on line" in the neighboring large markets, such as large market advertising and promotion typically carried over local media.

8. This situation is analogous to the cellular RSA's. Most RSA's which are next to large metropolitan areas have been very successful, due mainly to the fact that the RSA's economic vitality is driven by the large cellular customer base in the neighboring MSA's.

9. Further, there will be no possibility of networking or otherwise linking facilities to provide, for example, economies of scale which would increase a system's competitiveness and economic viability. This is especially acute where the competing IVDS

markets within the ADI do not contain Defaulters. Competitors will not only have a head start, but they will have a crucial competitive advantage in attracting investment capital, advertisers, program producers and joint venture partners.

IV. RELIEF REQUESTED.

10. The Commission has plenary power to ensure that the public interest is served in having fair and competitive auctions.

Section 1.2104(i) provides, in pertinent part, that:

"the Commission may delay, suspend, or cancel an auction in the event of...security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding...or cancel the competitive bidding in its entirety."

MKS believes that the bidding activity carried out by the Defaulters irreparably damaged the fair and efficient conduct of competitive bidding and that good faith applicants and bidders have an absolute right under the law, and in equity, to participate in a fair auction process. Therefore, MKS requests the Commission to implement one or more of the following remedies:

A. Give Auction Winners the Option to Accept or Rescind the Markets Purchased.

11. The Commission is requested to give each auction winner that has made the appropriate deposits and filings, the option to either Rescind its purchase of markets won at the July auction for any reason and receive a refund, or Accept the market(s) won and receive their licenses. By taking this action, the Commission will

accomplish several equitable results: (i) allow those winners who believe they paid fair market value to receive their licenses (ii) allow those winners who believe they paid too much to rescind (iii) allow those who believe they could not win their market(s) at a re-auction for the same price to receive their licenses (iv) allow those winners who were outbid or sidelined by Defaulters to rescind the second choice markets purchased (v) give every winner a fair choice and alleviate the irreparable harm that is affecting so many auction winners, and (vi) reduce the possibility of further litigation or default.

12. By adopting this proposed remedial action, all non-defaulting winners believing they paid too much would be given one last chance to either Accept or Rescind the market(s) won. By Accepting, the winner should be required to waive any and all irregularities and would be awarded their license(s) in due course. By Rescinding, the winner would be entitled to a prompt refund from the U.S. Treasury and would be required to release the Commission from any future claims. This form of remedial action may be accomplished quickly, inexpensively and expeditiously. Moreover, by taking this approach, the Commission can proceed with re-auctioning the markets quickly and without awaiting the outcome of its investigation of auction misconduct. By requiring each bona fide winner to make a choice, and waive past irregularities, the Commission serves the public interest, and alleviates the irreparable harm by giving the free and unfettered choice to each bona fide winner. Having received such a choice, surely no winner

could complain of having paid too much or of being denied the opportunity to bid in a fair auction. This proposal is more desirable than a complete re-auction, since this would preclude additional controversy from those winners who want to hold onto their licenses, notwithstanding the fact that Defaulters tainted the bidding process. Some individuals simply do not want to run the risk of being outbid for the market(s) they purchased at the July auction. Giving them the opportunity to make a choice is only fair and equitable.

B. Suspend Processing of Applications and Auction Payments.

13. At a minimum, the Commission should suspend processing of pending IVDS applications and auction payments until either its investigation of CRSP and others is completed or until it adopts a plan of equitable relief such as presented herein. To the extent that an Administrative Law Judge concludes that CRSP and other Defaulters engaged in improper or illegal activity, the not inconceivable prospect of unwinding the entire process becomes almost impossible if licenses have been issued and service has commenced. Until either the Commission's investigation concludes, or it adopts a meaningful plan of equitable relief, licensees will have a difficult time entering the business, simply because lenders will be reluctant to finance an industry with such a significant cloud hanging over it. In similar circumstances in the 220 MHz proceeding, the Commission extended system construction deadlines

until the *Evans* case was settled.²

14. In addition, no valid public interest is served by requiring further payments while application processing is suspended. It is inappropriate and patently unfair to require bona fide winners to make further financial commitments during this period of uncertainty. Finally, this is a perfect time to suspend processing. The Commission has concluded its initial review of all applications and released its September 22, 1994 list of those which are acceptable for filing. Upon concluding the CRSP investigation, or the adoption of a plan of equitable relief, the Commission can promptly grant applications as appropriate.

15. It is noteworthy to add that if the Commission were to adopt the proposal to give bona fide winners the option of accepting or rescinding the market(s) purchased, there would be no need to suspend the process of issuing licenses indefinitely while the investigation is underway. The Commission need only suspend the issuance of licenses until the re-auction has been held so that competing MSA licenses could be issued within the same general time frame so as to ameliorate "head start" issues.

C. Entertain Petitions to Extend Construction Deadlines.

16. Should the Commission determine to continue processing applications, it should liberally entertain petitions to extend construction deadlines until the later of, (1) one year from the date on which defaulted markets receive licenses, or (2) one year

² See GN Docket No. 93-252 and *Evans v. FCC*.

from the date on which the Commission concludes its investigations and the prospect of re-auctioning the entire spectrum is alleviated. Extending construction deadlines will prevent licensees from being placed between a rock and a hard place if uncertainty continues in this proceeding as a construction deadline approaches. Moreover, the Commission has the power to expedite its investigation, re-auction markets, and minimize the obvious head start problems which CRSP and others have engendered.

D. Grant Payment Relief.

17. In the event the Commission opts not to adopt an "accept or rescind" policy, the Commission should grant payment relief across the board to auction winners, using any number of options. For example, the Commission may declare a payment discount based upon the average percentage difference, on a per pop basis, between markets won by Defaulters, and markets won by bona fide bidders. Other options include extension of the payment term, reduction in the prevailing interest rate, and/or reduction in the amount of principal due during the first three years of the license term.

E. Grant Designated Entity Credit.

18. Qualified, sincere bidders were denied minority credits available in various markets in which the Defaulters were high bidders in the first auction. For example, MKS was outbid in the first auction round for market number 47-Greensboro, NC in which the defaulting bidder took the minority credit. MKS was successful in acquiring the second available license for Greensboro, NC, but was denied the minority credit due to it being taken by the

defaulting first round bidder. In addition to one of the previously proposed solutions suggested herein, the Commission is urged to award the designated entity bidding credit to the surviving sincere bidders (if qualified for such designated entity credit) in specific markets in which the defaulting bidders took the minority credit in the first round auction.

V. CONCLUSION

19. In the interest of equity and justice, it is urged that the Commission take the following actions forthwith:

- (i) Give the option to all bona fide auction winners to either accept or rescind the market(s) won. In the case of rescission, a prompt refund should be made. All non-defaulting auction winners should be required to affirmatively elect one choice or another and to release the Commission from any further liability or concern in the matter;
- (ii) Issue a public notice which sets a date for a re-auction of all defaulted and rescinded MSA licenses (excepting those Defaulters which were merely minor late payments) to be held not later than sixty (60) days from the date of the notice;
- (iii) Limit the participants in the re-auction to those persons who filed FCC Form 175 in the June, 1994 filing window and exclude any persons who defaulted on their payments (except for minor late payments);
- (iv) Suspend the issuance of any licenses until the re-auction is complete, unless the Commission receives a specific request for expedited issuance by a bona fide auction winner, provided such expedited issuance would not prejudice a competing licensee within the same ADI;
- (v) Revise the auction rules to prevent the abuse and harm that has been rendered to the Commission and the bona fide auction winners by requiring a financial showing by bidders prior to the re-auction which would qualify them as to the total amount each may bid at the re-auction. For example, bids could be limited to ten times the amount of certified checks deposited with the FCC by each

bidder at the start of the auction, thereby at least assuring payment of the initial down payment.

- (vi) Award the Designated Entity Credit to MKS in connection with market number 47-Greensboro.

Respectfully submitted,



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